

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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MAY 12 2006

In the Matter of)
)
ARKANSAS CABLE)
TELECOMMUNICATIONS)
ASSOCIATION; COMCAST OF)
ARKANSAS, INC.; BUFORD)
COMMUNICATIONS I, L.P. d/b/a)
ALLIANCE COMMUNICATIONS)
NETWORK; WEHCO VIDEO, INC.; and)
TCA CABLE PARTNERS d/b/a COX)
COMMUNICATIONS,)
)
Complainants,)
)
v.)
)
ENTERGY ARKANSAS, INC.,)
)
Respondent.)
)

Federal Communication Commission
Bureau / Office

EB Docket No. 06-53

EB-05-MD-004

RECEIVED

MAY 15 2006

Federal Communications Commission
Office of the Secretary

To: Honorable Arthur I. Steinberg
Administrative Law Judge

**OPPOSITION TO RESPONDENT'S MOTION TO ENLARGE CHANGE AND
DELETE ISSUES IN THE HEARING DESIGNATION ORDER**

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ATTACHMENT LIST

Declaration and Affidavit of J. D. Thomas

Affidavit of Jeff Gould

- Exhibit 1: *Arkansas Cable Telecomms. Ass'n et al. v. Entergy Arkansas, Inc.*, File No. EB-05-MD-004, Reply Declaration of Michael T. Harrelson, P.E., filed June 10, 2005.
- Exhibit 2: *Arkansas Cable Telecomms. Ass'n et al. v. Entergy Arkansas, Inc.*, File No. EB-05-MD-004, Reply Declaration of Jeff Gould, filed June 10, 2005.
- Exhibit 3: *Arkansas Cable Telecomms. Ass'n et al. v. Entergy Arkansas, Inc.*, File No. EB-05-MD-004, Reply Declaration of Marc Billingsley, filed June 10, 2005.
- Exhibit 4: *Arkansas Cable Telecomms. Ass'n et al. v. Entergy Arkansas, Inc.*, File No. EB-05-MD-004, Complaint Declaration of Jeff Gould, filed February 18, 2005.

SUMMARY

In this Opposition, Complainants show that Respondent Entergy's motion to modify Issue 4(c) in the Hearing Designation Order should be denied. Entergy's motion fails the most basic requirements of Rule 1.229 and is contrary to 45 years of Commission precedent generally prohibiting the modification of HDOs. The overwhelming evidence in this case supports preserving the HDO exactly as the Bureau prepared it – which it did in accordance with *the parties'* August 29, 2005 Joint Stipulation and April 14, 2006 Joint Report.

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**OPPOSITION TO RESPONDENT'S MOTION TO ENLARGE
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THE HEARING DESIGNATION ORDER**

Complainants Arkansas Cable Telecommunications Association,
Comcast of Arkansas, Inc., Buford Communications I, L.P. d/b/a/ Alliance
Communications Network; WEHCO Video, Inc. and TCA Cable Partners d/b/a Cox
Communications ("Complainants") respectfully submit this Opposition to

Respondent's Motion to Enlarge, Change and Delete Issues In The Hearing Designation Order filed by Respondent Entergy Arkansas, Inc. ("Entergy" or "EAI") on May 4, 2006. Entergy's motion is procedurally deficient and fails to meet the stringent standard for modification of hearing designation orders. Entergy, moreover, is estopped from bringing its motion, which is supported by ample evidence that the HDO was properly crafted and Entergy has presented no reason why there should be any departure from the Commission's 45 years of precedent that overwhelmingly favors leaving HDOs intact.

I. THE HDO SHOULD NOT BE MODIFIED

While Entergy has characterized its requested action as an amendment or narrowing of Issue 4(c) in the March 2, 2006 HDO, it in fact seeks the outright deletion of perhaps the most critical issue in the HDO. Specifically, Entergy seeks to delete issue 4(c) which addresses how Entergy's *own* engineering and construction practices force unreasonable costs and other terms and conditions on Complainants and to replace it with an issue focused solely on cable operators' putatively noncompliant attachments. The motion should be denied.

A. Entergy Has Not Met The Minimum Requirements of Rule 1.229

One needs to look no further than the plain text of the rule itself to conclude that Entergy has not met its burden. Specifically, Rule 1.229(d) requires that such "motions. . . shall contain specific allegations of fact sufficient to support the action requested [and] shall be supported by affidavits of a person or persons

having personal knowledge thereof.” The only thing resembling an affidavit attached to EAI’s submission is the catch-all “Verification” (*i.e.*, not “affidavit” as the rules require) of counsel. The entirety of the “factual showing” in counsel’s verification is as follows: “[E]xcept for those facts of which official notice may be taken, to the best of my knowledge and belief, all the facts stated therein are true and correct.” The only “facts” mentioned in its motion are limited to its characterizations of statements that the Bureau made in the HDO. It does not assert any facts relating to its engineering and construction practices or even those of the cable operator complainants to provide any potential basis for grant of the motion. *Verification of William Webster Darling* ¶ 1 (filed May 4, 2006). This does not meet the Commission’s standard for altering issues in an HDO, which requires specific allegations of fact sufficient to support the action. *See, e.g., The Western Union Tel. Co.*, 89 FCC 2d 538 (1982); *Gary D. Terrell, Rita L. Young*, 102 FCC 2d 78 7 (Rev. Bd. 1985); *Faith Tabernacle, Inc.*, 69 FCC 2d 30 (Rev. Bd. 1977).

B. Modification Of The HDO Is Contrary To Long-Standing Commission Policy and Precedent

For at least 45 years, the Commission has placed an overwhelmingly heavy burden on parties seeking to alter—and especially delete—issues from hearing designation orders. *See, e.g. Fredericksburg Broad., Corp.*, 19 R.R. 1369, 1370 (1960) (interlocutory petition to modify issue from hearing designation order is not appropriate and should be decided at hearing); *Veterans Broad. Co.*, 22 R.R. 949, 950 (1962) (interlocutory petition to delete issue from

hearing designation order is not appropriate and should be decided at hearing). It will only do so where “there are unusual circumstances such as where the Commission overlooked or misconstrued pertinent information before it at the time of designation.” *Federal Broad. Sys., Inc.*, 63 FCC 2d 216 (Rev. Bd. 1976); *Cowles Broad.*, 29 FCC 2d 799 (Rev. Bd. 1971); *Viking Broad.*, 16 FCC 2d 1015 (Rev. Bd. 1969); *Sundial Broad.*, 15 FCC 2d 1002 (Rev. Bd. 1969); *Theodore Granik*, 2 FCC 2d 252 (Rev. Bd. 1965). *Post-Newsweek Stations, Florida, Inc.*, 52 FCC 2d 883 (Rev. Bd. 1975); *Edward G. Atsinger, III*, 30 FCC 2d 493 (Rev. Bd. 1971). No such circumstances exist here and there is no basis for departing from the Commission’s “regular policy of refusing to delete hearing issues, *particularly when a hearing must be held in any event*,” *Jimmie H. Howell*, 44 FCC 2d 804 (Rev. Bd. 1974) (emphasis added). This long history explains why, of the stacks of cases that the Commission has decided on this question, Entergy has not cited a single one in its motion.

EAI’s motion is really a vehicle to rehash jurisdictional arguments that it has made—and lost—elsewhere 1/ and apparently plans to make yet again in the future.2/ With a full record before it, the Bureau has dispatched the jurisdictional argument and with it any notion that Issue 4(c) is improperly crafted.

/ See *Arkansas Cable Telecomms. Ass’n et al. v. Entergy Arkansas, Inc.*, Hearing Designation Order, DA 06-494 (rel Mar. 2, 2006), Erratum (rel. Mar. 6, 2006), 71 Fed Reg. 20106 (April 19, 2006).

/ See Motion ¶ 1, n. 1.

Adopting Entergy's suggestion that the Commission lacks jurisdiction to determine the justness or reasonableness of the engineering standards a utility may impose on attachers would largely rob section 224(b)(1) of meaning. Under Entergy's construction, the Commission would lack jurisdiction any time a utility raised safety or reliability concerns to justify the engineering standards it imposed on attachers. To allow utilities to thus evade Commission review would undermine the purpose of section 224 to "prohibit utilities from engaging in unfair pole attachments practices."^{3/}

Part of the "engineering standards it has imposed on attachers" is the requirement that cable pay to remedy plant conditions that Entergy created. This a core aspect of Commission pole attachment jurisdiction. Where, as here, a party seeks deletion of an issue in part based on an argument that the Commission lacks jurisdiction over the matter the motion is to be rejected. *See United Tele. Co. Of Pa., Inc.* 42 FCC 2d 1003 (Rev. Bd. 1973) (legal arguments do not constitute an adequate basis for deletion of issues).

C. Entergy Is Estopped From Moving To Delete and Replace Issue 4(c)

Entergy is estopped from seeking a change to the HDO because – at the very least – it has consented to issue 4(c) as it appears in the HDO. Specifically, in the April 14, 2006 Joint Report of the Parties Entergy (and Complainants) made the following statement: "The parties agree that discovery will be needed on each of the subjects identified in Section IV, Paragraph 18, of the March 1, 2006 Hearing

^{3/} HDO ¶ 12 (citations omitted).

Designation Order in this proceeding.”^{4/} Issue 4(c), of course, which Entergy seeks now to change, is found at Section IV, Paragraph 18. Entergy did not attempt either to reserve its rights to seek amendment of any of the “subjects identified” in the HDO or otherwise indicate that any modification of those subjects—in its view—would be warranted. Three weeks after this stipulation, and two weeks after the release of the procedural schedule in this proceeding, Entergy cannot now seek to reverse course.

Moreover, the parties entered into a Joint Statement of the Issues, filed on August 29, 2005. Included among the identified issues is: “Whether EAI Has Installed Electric Facilities Out Of Compliance With The NESC And Its Own Standards And If So, Whether It Is Responsible For Costs Associated With Those Incorrect Electric Plant Installations That Create Safety Violations.” *See* Joint Statement, filed Aug. 29, 2005, at 86. Although Entergy objected to the *phrasing* of this *question*, it did not object to the inclusion of this *issue*. *Id.* Rather, it made the same jurisdictional arguments it makes in its motion. *Id.* Entergy’s reliance on the very same arguments that the Commission already considered – and unequivocally rejected – does nothing at all to undermine the fact that it stipulated to the issue some seven months ago. The August 29, 2005 Joint Statement and Entergy’s stipulation were lynchpins of the Bureau’s HDO. Having had multiple bites at the issues apple, Entergy cannot have yet another one again now.

/ Joint Report Of The Parties at 3 (filed April 14, 2006).

D. The HDO Was Carefully Crafted On The Basis Of A Fully Developed Record And Should Not Be Disturbed.

With the benefit of a fully developed record, the Bureau carefully crafted 4(c) to account for the fact that Entergy's practices affect cable operators in a way that very well might run afoul of Section 224 and Commission precedent. Complainants showed the Bureau in Phase I of the proceeding that Entergy's practices resulted in operating conditions and in the imposition of just and reasonable terms and condition of attachment sufficient to warrant designation of the issue exactly as drafted. 5/

The starting point for understanding exactly why—based on the facts of this case—that issue 4(c) was correctly drafted is (1) the long-standing Commission precedent that communications attaching parties like Complainants are not responsible for clearing violations created by others, *see e.g., Cavalier Tel., LLC v. Virginia Elec. & Power Co.*, 15 FCC Rcd. 9563, ¶ 16 (2000) (“*Cavalier*”), *vacated by settlement*, 17 FCC Rcd. 24414, ¶ 19 (2002) (in issuing the vacatur, the Commission specifically stated that its decision did not “reflect any disagreement with or reconsideration of any of the findings or conclusions contained in” *Cavalier Tel. LLC v. Virginia Elec. & Power Co.*); *Knology, Inc. v. Georgia Power Co.*, 18 FCC Rcd. 24615, ¶ 40 (2003), (2) the fact that Entergy places its electric facilities on the

/ Indeed, while Complainants believe that even without any factual showing on their part in this Opposition they have made a showing sufficient to defeat Entergy's motion, Complainants are mindful that Rule 1.229 requires that oppositions to motions to enlarge, change or delete issues “shall contain specific allegations of fact sufficient to support the action requested.”

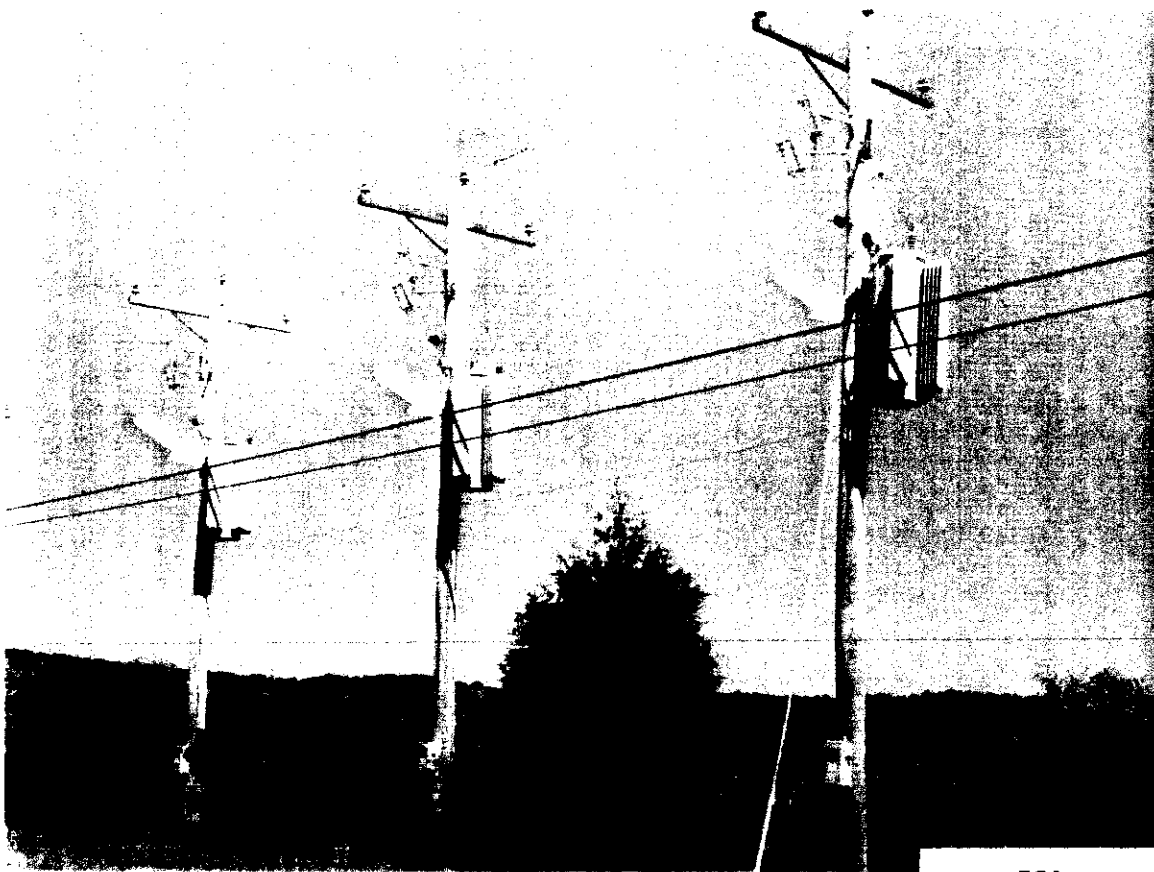
poles, after cable has safely placed its wires on the pole and then seeks to force the correction costs on cable; and (3) Entergy's forcing Complainants to fix EAI's violations was a central aspect to Entergy's decision to retain its contractor USS so that USS and Entergy could engineer ways to shift *Entergy's* repair costs onto cable operators. In other words, it is more than just Entergy's encroachment into the cable operator's space, but it relates to the justifications that EAI has cited for performing the audits and imposing unjust and unreasonable standards on cable operators in the first place.

While the anatomy of pole attachments will be addressed in detail later in this proceeding, for the purposes of ruling on EAI's motion, it is sufficient to understand that electric attachments are generally supposed to be at the top of the pole, and communications attachments at the bottom of the pole's usable space, beginning approximately 18 to 20 feet above ground. The top communications facilities and the bottom electric facilities are separated by what is known as the communications worker safety zone – typically 40 inches.

The Bureau had before it ample evidence demonstrating both that Entergy routinely builds its facilities too low on the pole to create violations with cable television attachments, and that its own safety practices were a factor in forcing clean-up costs onto cable companies. Specific examples from the Phase I record (and two very recent examples we present after, *see* pages 17-22, *infra*) will show the soundness of the Bureau's framing of the issue.

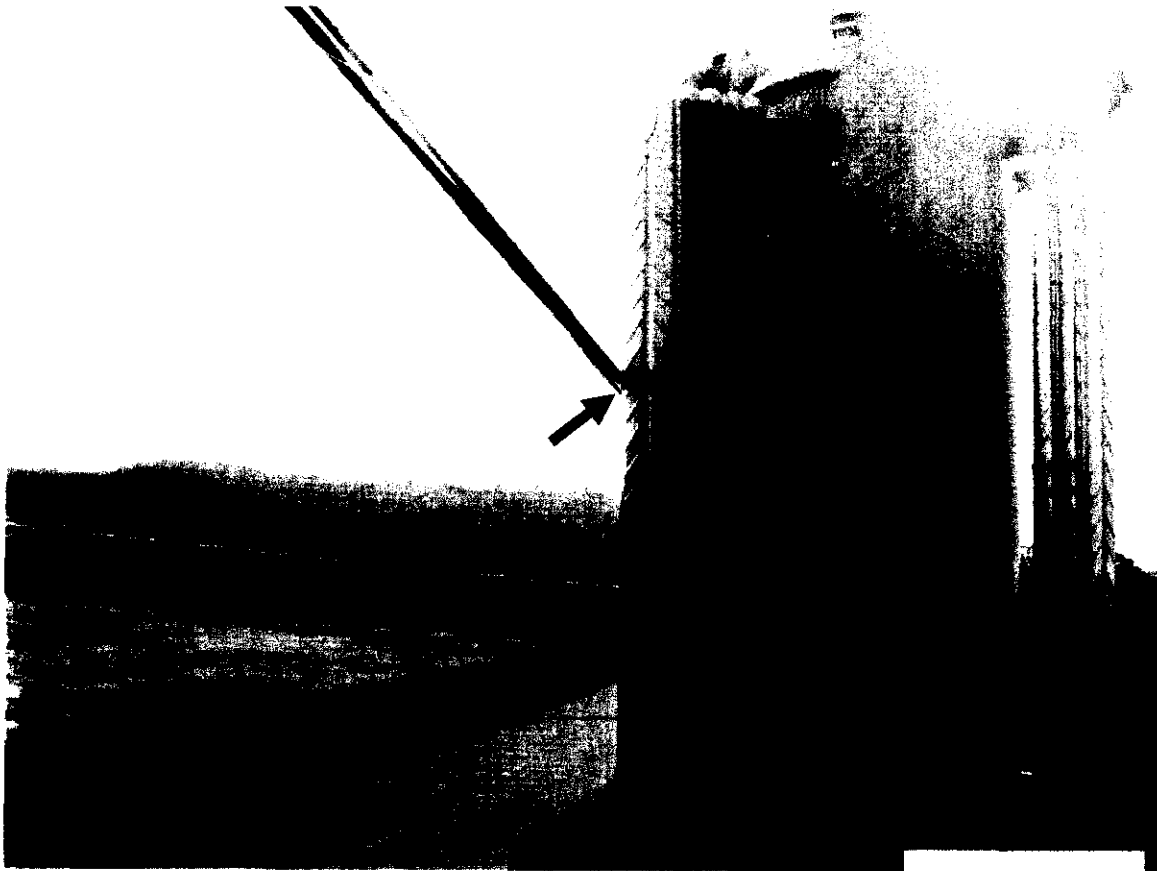
First, as to Entergy's practice of creating violations with respect to cable attachments the following photographs and descriptions taken from the Reply Declaration of Complainants' Phase I expert Mickey Harrelson illustrate the point. 6/

/ Mr. Harrelson's complete sworn Phase I Reply Declaration is attached as Exhibit 1. The Reply Declarations of Cox's Jeff Gould and Comcast's Marc Billingsley, the employees who also have direct knowledge of the poles depicted and who were responsible for taking these photographs are attached as Exhibits 2 and 3, respectively. Paragraphs 22-24 of Mr. Gould's Reply Declaration and Paragraph 26-27 and 46 of Mr. Billingsley's Reply Declaration specifically discuss the consequences of Entergy's safety practices. That topic is discussed throughout Mr. Harrelson's Reply Declaration. The photographs and descriptions appear here exactly as they appear in Mr. Harrelson's Reply Declaration.



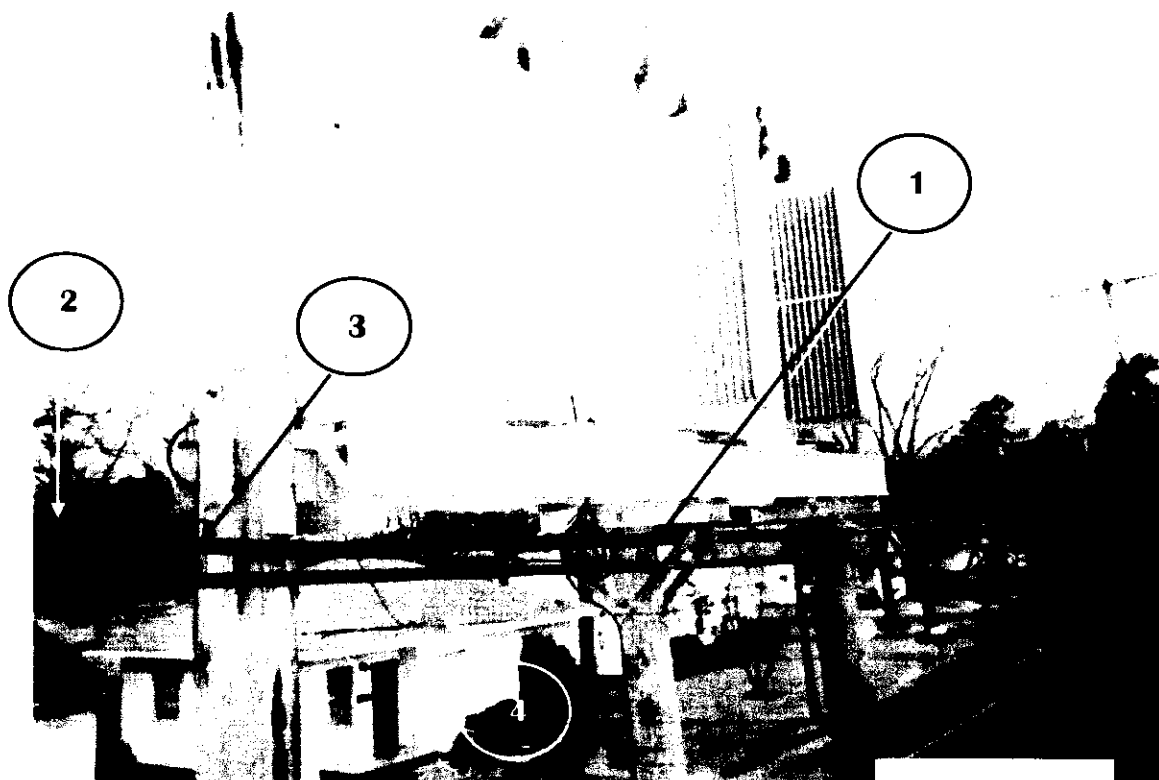
- 50A -

These photographs were taken at the direction of Jeff Gould of Cox in that company's Russelville system. Here, the power company very recently has (1) installed new poles; (2) put up three step voltage regulators, and (3) put the regulator tanks into direct contact with the pre-existing communications lines. The communications cable near the top of the long regulator tanks is much less than 40 inches to the exposed high-voltage wires and connections on top of the regulator tanks and within easy reach of workers and sudden death. In addition, the neutral that according to EAI must in all cases be 40 inches *above* communications, EAI actually installed several feet *below* communications. But the communications lines are not connected to these poles and are merely rubbing against these regulator tanks. This is obvious from the next photo.



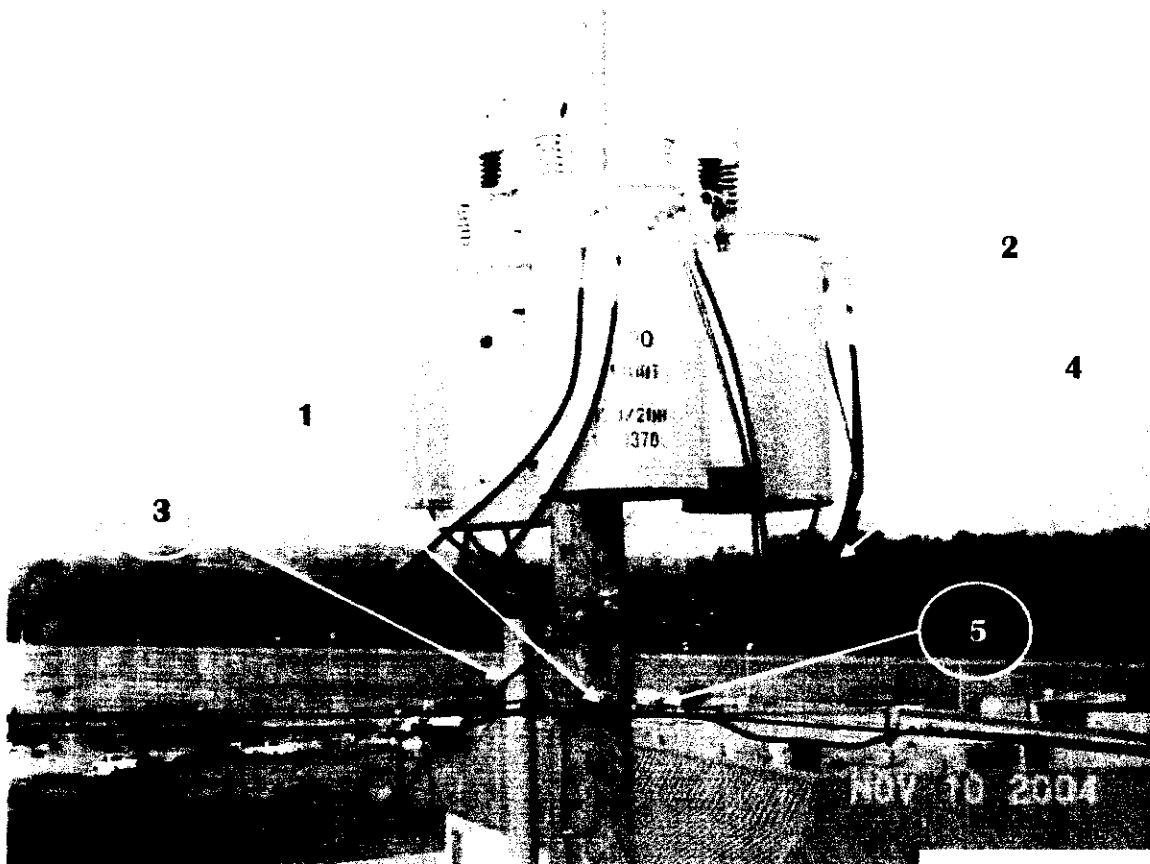
- 51A -

This photo was taken at the direction of Cox's Jeff Gould.



- 26A -

This photo, taken at the direction Jeff Gould of Cox Communications, shows a multi-pole platform-mounted voltage regulator that Entergy has installed *after* the installation of communications facilities. Note on the center pole the steel bracket (Arrow #1) that has completely boxed in the two sets of communications lines on the poles. The top line is the cable attachment (Arrow #2). EAI set new poles, pulled Cox's cable down and physically forced it beneath a bolt through one pole (Arrow #3). EAI built its neutral wire below the telephone cable (Arrow #4). Neither cable tv nor telephone is attached to either pole or bonded to the pole grounds. This creates a very dangerous situation. In installing these facilities Entergy has violated NESC rules, cable tv, telephone and EAI standards. This photo shows that EAI has a lack of understanding of the NESC, lack of training, no inspection of new construction and a complete disregard for users of the communications space. Electric companies, like communications companies from time to time must add new facilities to their networks. But they must do so in a way that respects the rights of others to occupy the poles, including providing adequate notice of the work that they wish to perform on the poles.

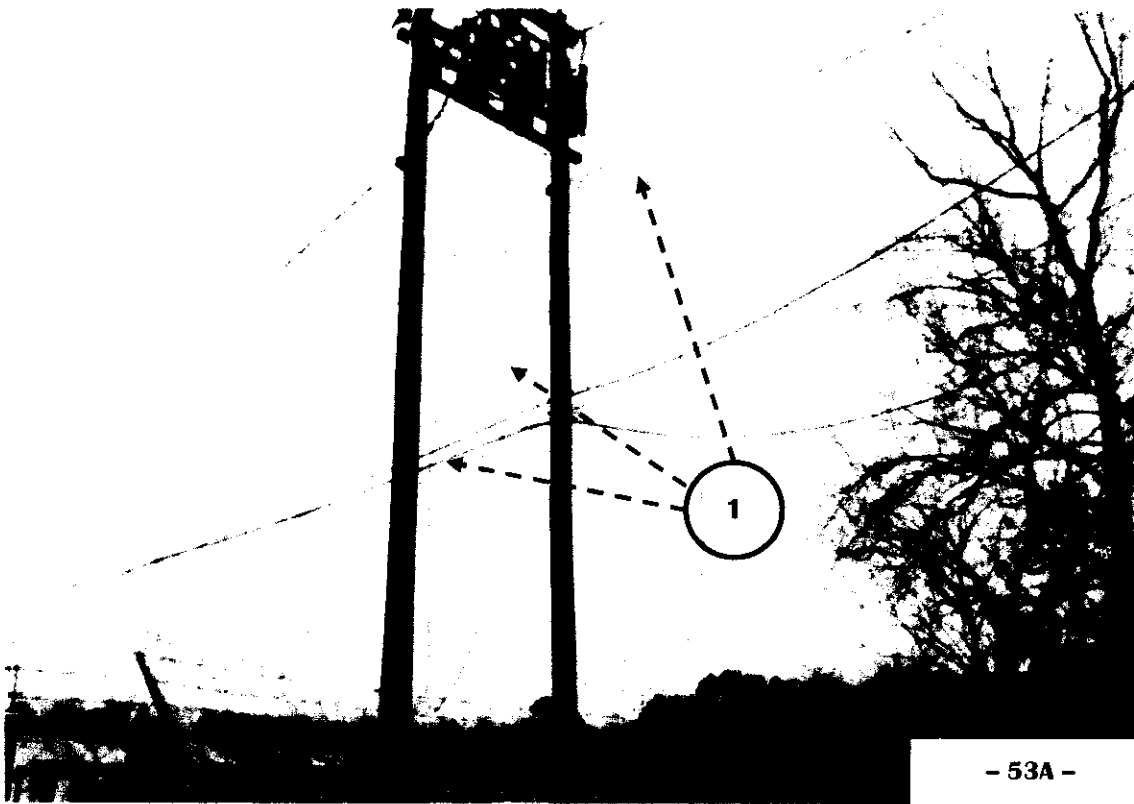


-- 22A --

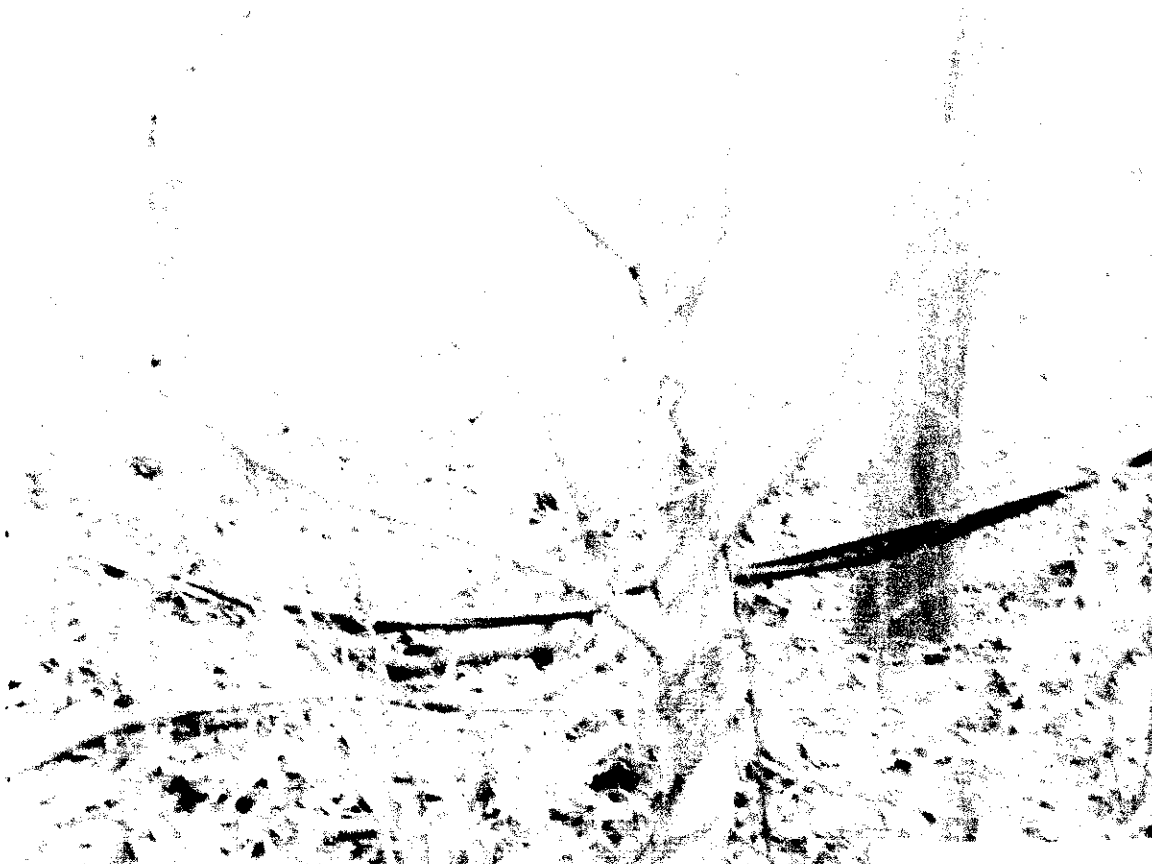
One of Entergy's central contentions is that electric facilities always are on the poles first and that cable facilities always come later. This is so it can argue that whenever there are clearance violations, they have been created by cable. This photo shows that this is not true. The three-phase transformer bank depicted in this photo were installed within the last several months to provide electric service to a new McDonalds restaurant. The poles and the cable television attachments (Arrow #1) were installed before the offending riser conduits and transformers. Cox was attached in compliance. The new transformer cans (Arrow #2) the grey "riser" conduit (Arrow #3) and the electric wires (Arrow #4), were installed after cable. There are no more than a few inches of separation between the hot electric wires coming out of the riser (Arrow #3) and Cox's facilities (Arrow #1). The NESC mandates that there should be 40 inches between the riser cable and the Cox attachment. I believe that this pole was set by EAI to provide adequate vertical clearance above the new driveway at the McDonalds. These photos were taken at the direction of Jeff Gould of Cox.

Second, as to the fact that the non-compliant condition of Entergy's electric plant lay behind the unlawful program targeting cable, there was ample evidence to support the Bureau's conclusion there as well. In other words, the state

of non-compliance of Entergy's own facilities was so great, and the fact that there existed evidence that forcing cable to refurbish Entergy's aerial plant was a factor in Entergy's deployment of USS and its unreasonable engineering standards made issue 4(c) an appropriate area of inquiry in this proceeding. The following two examples demonstrate how EAI's and only EAI's practices jeopardize cable plant, cable workers and others.



This photograph which was taken at the direction of Marc Billingsley of Comcast, shows dead primary lines hanging down (Arrow #1) from the top of high-voltage power distribution poles near an abandoned bicycle factory at 6301 Patterson Road in Little Rock. The power lines, even though apparently de-activated, create a dangerous situation because they touch the cable television support strand and they hang down low to the ground. The work rules of the NESC apply to electric workers and communications workers. They do not permit workers to treat such lines as dead unless they are disconnected from the source, tested for absence of voltage and grounded. Further, NESC rule 214.B.3. states that lines permanently abandoned shall be removed or maintained in a safe condition. These abandoned lines create serious hazards for workers and the public.



- 38A -

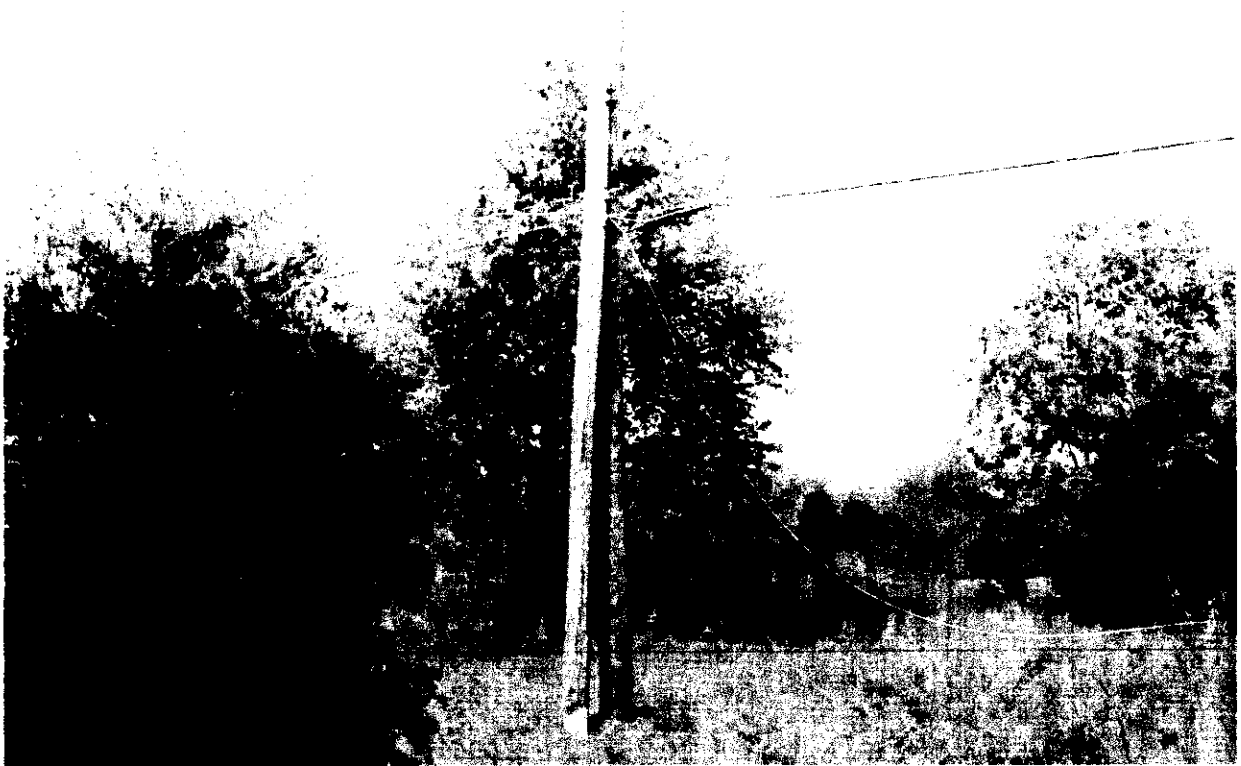
This photograph, which was taken at the direction of Comcast's Marc Billingsley, shows a hot EAI electric service lying on the ground of some woods near a residential area in Little Rock. This hazard was initially reported to EAI by USS during its "safety audit." Comcast discovered it during a follow up engineering trip to the pole, identified by USS. Entergy still had not reattached it to the pole as of June 7, 2005. A hot wire on the ground is a serious hazard to the public. This illustrates a major clear disconnect between EAI's claimed emphasis on safety and its trouble response department.

Complainants also showed that a central driver for EAI's audit program was the promise that its contractor, USS, made to refurbish EAI's aerial plant at cable's expense plus generate for Entergy a 10% profit. *See* Complaint Declaration of Jeff Gould ¶¶ 24-25 (Attached as Exhibit 4). Obviously, a demonstration of non-compliance by EAI of NESC and other safety codes is essential for determining the complete purpose, nature and effect of Entergy's and USS' audit and the unreasonable standards that it seeks to impose on cable

operators. Nor are these kinds of problems simply historical; they persist to this day. As set forth in the accompanying Affidavit of Jeff Gould, Entergy replaced a broken—virtually completely destroyed—pole at a major highway crossing (at I-40 in Russelville). Rather than notify Cox that the old pole was destroyed and being replaced with a new pole, let alone transferring Cox’s facilities from the old pole to the new pole, Entergy simply tied off the old pole with copper wire, and left Cox’s facilities and the pole in the state depicted in the photos below. These photos were taken at Jeff Gould’s direction (and with the accompanying narratives are reproduced exactly from Mr. Gould’s May 12, 2006 Affidavit (attached)) on April 28, 2006 after Cox’ contractor discovered the condition of this plant by happenstance. While Cox repaired these violations after documenting them with these photos, the photos show a potentially extremely dangerous situation.



In this first photo you can see that Entergy has tied off the old broken pole to the newly set pole with copper wire. The black cable in the middle is ours. The grey metal cables are slack and useless down guys that you can see more clearly in the next photo.



There is a lot of information in this photograph, but you can clearly see the old pole leaning into the new pole, the slack guy wire and old strand that Entergy left dangling in the field. Fortunately, a tree (depicted in the photo following the next one) gave our cable sufficient clearance across the interstate so that there was no tear down and/or, worse, a major motor vehicle accident on the interstate.



This is what the old pole and the new pole look like at their bases. (The dangling wire is the copper grounding wire from the old pole.)



This final photo shows the highway crossing. The new and old poles appearing in the preceding photos, are approximately 30 feet behind the photographer. Fortunately because of the tree appearing to the left of the pole in the distance, our cable before the repairs had sufficient clearance across I-40 at this location and a major tear down (or worse) was avoided. A reasonably brisk wind could have blown those cables out of the tree, however.

Furthermore, as final preparations were being made to submit this Opposition and Mr. Gould's affidavit, Mr. Gould learned that Entergy crews had intentionally cut a critical 24-count fiber-optic cable, cutting service to many hundreds of his company's customers. Mr. Gould states:

[L]ate in the day on May 11, 2006 when I was finalizing this affidavit, I received word that Entergy intentionally cut one of our 24-count fiber lines. This line is an essential link to providing rural broadband to our customers in and around Gurdon, Arkansas. Entergy crews apparently cut the line in order to facilitate repairs of their lines which were damaged when thunderstorms passed through the area. This cut of our line was entirely avoidable. Entergy